Supreme Court, U.S.
MAY 20

No. 92-1693

In The

Supreme Court of the United States

October Term, 1992

ROBERT E. JOHNSON,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED PRECEDENTS OF THIS COURT IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT BASED ON THE STATUTE OF LIMITATIONS, WHERE THE FACTS OF THIS FELA CASE MADE CLEAR THAT THE PLAINTIFF HAD FAILED TO FILE SUIT WITHIN THREE YEARS OF THE DATE HE KNEW, OR SHOULD HAVE KNOWN, OF HIS INJURY AND ITS CAUSE?

DESIGNATION OF CORPORATE RELATIONSHIPS

Norfolk and Western Railway Company, filing this Brief in Opposition as the respondent in this proceeding, states that this is its original Designation of Corporation Relationships. The parent company of Norfolk and Western Railway Company is Norfolk Southern Railway Company. Norfolk and Western Railway Company does not have any subsidiaries (excepting wholly owned subsidiaries).

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STATUTE INVOLVED

Section six of the Federal Employers' Liability Act provides in pertinent part:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

COUNTERSTATEMENT OF THE CASE

Routine application of established legal principles to the particularized facts of this case resulted in dismissal of plaintiff's claim under the Federal Employers' Liability Act (FELA) based on the plaintiff's failure to comply with the three year statute of limitations established under the FELA, 45 U.S.C. § 56. The United States District Court for the Western District of Virginia and the United States Court of Appeals for the Fourth Circuit properly determined that plaintiff's claim was barred because it was filed more than three years from the date he knew, or in the exercise of reasonable diligence should have known, of his injury and its work-related cause.

1. Plaintiff, Robert E. Johnson, began working for the Norfolk and Western Railway Company ("NW") in 1969 as a yard clerk. (JA 18, 39.)[1] He was employed in the NW computer center from 1979 to 1990. (JA 21-23.) He filed his Complaint on November 15, 1988, alleging that

[1] All references to the Appendix filed with this Court will be made as follows: "App. ___." References to the Joint Appendix in the United States Court of Appeals for the Fourth Circuit will be made as "JA ___."

his hearing was damaged because NW had exposed him to excessive noise in the workplace.

2. Johnson provided no evidence that he filed his Complaint within the applicable statute of limitations.[2] In his deposition, Johnson testified that he simply did not "know when [his] hearing problems started." (JA 21.) He specifically recalled experiencing hearing problems during the eleven-year period of his employment in the NW computer center, but he could not relate these problems even to a *general* time period. Johnson admitted, for example, noticing that his hearing would be diminished after working in the computer center. (JA 22-23.) Asked when he noticed this problem, Johnson replied, "I couldn't give you a specific date." (JA 23.) He recalled having to turn up the volume on his radio to hear it after working in the computer center, but could not state when he first noticed this problem. (JA 24-25.) He remembered that at some point he had noticed a ringing in his ears after work, but was unable to say when he had noticed it. (JA 30.) Johnson recalled that he had experienced problems hearing conversations. (JA 31.) When asked if he had "any idea when the first time was" that he noticed this problem, Johnson replied, "I can't give you a date." (JA 31.)

3. Johnson discussed his hearing problem with a Dr. McLean, an audiologist from the University of Virginia, in December, 1986. In the records of his examination, Dr.

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[2] Johnson has conceded at every stage of the proceedings that he bears the burden of proving compliance with the statute of limitations under the FELA. (App. 4a.)

McLean wrote that Johnson presented a number of hearing complaints and that, "Over the past 2 yrs. he notes that he does not hear well." (JA 43.) Johnson was questioned extensively in his deposition about this medical report (which *he* had introduced into evidence). He admitted that he had no basis on which to dispute its substance. (JA 32-33.)

Moreover, he conceded that he could not deny that his hearing problems might have begun *long before* 1984 (the year Dr. McLean's notes indicated he was aware of his hearing loss):

> Q But *do you have any basis for denying that it might have been two years before you went to see Doctor McLean when you first noticed your hearing loss?*
>
> A *A basis, no sir.*
>
> Q Do you have any basis for denying that it might have been even earlier than that, say as early as 1982?
>
> A Again, I repeat I do not remember when that was.
>
> Q And so you do not have any basis for denying that it might have been as early as the first year you worked in the computer room, 1979?
>
> A I do not remember when it was, sir.
>
> Q But what I am asking you is whether you can deny to me that it might have been as early as 1979.
>
> A I don't have a date.

Q I know you don't have a date, and that is what I am asking. *You don't remember when it was that you first noticed it.*

A *Exactly, yes sir.*

Q *So you don't have any basis to deny that it might have been as early as 1979 when you first noticed your hearing loss.*

A *A basis, no sir.*

(JA 32-33, emphasis added.)

4. Johnson also could not identify any cause for his hearing loss other than the noise he encountered at work. (JA 35.) Thus, the source of Johnson's alleged hearing loss was uncontested.

5. After conducting written discovery and deposing Johnson, NW moved for summary judgment on the grounds that Johnson's claim was barred by his failure to comply with FELA's three-year statute of limitations. NW argued that Johnson could not prove compliance with the statute of limitations because the only pertinent evidence in the case placed the accrual of his cause of action outside the statute of limitations, and Johnson could produce no evidence showing that he had filed within the limitations period.

Johnson responded with an after-the-fact affidavit in which he sought to contradict his prior deposition testimony. (JA 69-71.)[3] Notwithstanding his prior sworn testimony that he could not recall even generally when he

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[3] It is well established that it is impermissible to use affidavits to contradict prior deposition statements. *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984)

experienced his hearing problems, Johnson now stated in his affidavit that he did not become "consciously aware" that his hearing problems were "permanent" until approximately 1986. (JA 70.) While he acknowledged that he had experienced a wide variety of hearing problems prior to that date, he suggested that he had believed they were "temporary" problems.[4]

6. After full briefing and oral argument on the statute of limitations issue, the District Court entered an Order and Memorandum Opinion granting NW's Motion for Summary Judgment, holding that "Mr. Johnson did not file suit within three years of the date he knew, or reasonably should have known, of his hearing impairment." (App. 12a.) The Fourth Circuit affirmed, stating:

> We agree with the district court that Johnson cannot carry his burden of proof to establish that he instituted suit within three years of the accrual of his cause of action. It is evident from Dr. McLean's report that Johnson himself believed that he had been injured at least as of December 12, 1984. Even without Dr. McLean's report, Johnson would be unable to prove to a rational fact-finder that he complied with the statute of limitations, because he admittedly cannot remember when his hearing problems began and, indeed, he testified that they may have begun as early as 1979. The court therefore correctly held that Johnson's FELA claim, which was brought nearly four years after he knew or

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[4] For example, he alleged in his affidavit that it was not until 1986 that he realized that he had "a *constant* ringing in [his] ears," as opposed to the prior ringing in his ears which was not constant. (JA 69, emphasis added.)

> should have known of his injury, was time-barred.

(App. 4a) (citations and footnotes omitted.)

REASONS FOR DENYING THE WRIT

The question presented by Johnson's petition for certiorari does not warrant review by this Court.

1. The sole issue presented by the petition – whether the plaintiff filed his complaint within three years of the accrual of his cause of action – involves nothing more than a routine application of well-settled law – *Urie v. Thompson*, 337 U.S. 163 (1949); *United States v. Kubrick*, 444 U.S. 111 (1979); and 45 U.S.C. § 56 – to the unique facts of this case.

a. Under *Urie* and *Kubrick*, the "discovery rule" provides that a plaintiff's cause of action accrues when he knows, or in the exercise of reasonable diligence should know, of his injury and its probable cause. *Urie*, 337 U.S. at 170-71; *Kubrick*, 444 U.S. at 123. Johnson concedes that "all courts asked to determine when a hearing loss claim accrued under the FELA agree that *Urie* controls. . . . " (Petition at 4.) Johnson suggests, however, that the lower courts have departed from the precedent of this Court in their application of the discovery rule, and that a split of authority exists on the question. To the contrary, the cases to which Johnson points as evidence of a "conflict" simply reflect a spectrum of possible outcomes under the *Urie* analysis depending upon the particular facts of each case.

Certainly the facts of this case mandated an award of summary judgment on the basis of plaintiff's failure to file his claim within the applicable statute of limitations. Johnson cites no case in which the plaintiff was deemed to comply with the statute of limitations where, as here, (1) the plaintiff conceded there was no possible source of injury other than exposure to work-related noise, (2) the plaintiff's own medical evidence showed that he was cognizant of his hearing loss at least four years prior to filing his claim, and (3) the plaintiff's sworn deposition testimony showed that he could not deny that the hearing loss could have occurred as much as nine years before suit was instituted.

b. Faced with a total absence of evidence that he filed his action within the statute of limitations, Johnson attempts to rewrite the discovery rule. He argues that the statute of limitations should not have been triggered until he became "consciously aware" that his injury was "permanent," notwithstanding his years of prior hearing problems. Suffice it to say, the discovery rule as established by this Court is an objective test, rather than a subjective one. As the court below properly ruled, a plaintiff cannot hold the statute of limitations in abeyance by simply ignoring years of hearing problems and then claim that the limitations period only began to run when the problems were finally diagnosed or recognized as "permanent." There are no cases which support Johnson's subjective analysis. Under existing standards Johnson's claim clearly was time-barred. Johnson's effort to expand the traditional discovery rule should be rejected and his petition denied.

I. THE DECISIONS BELOW CORRECTLY APPLIED WELL-SETTLED PRECEDENTS OF THIS COURT IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT BASED ON THE STATUTE OF LIMITATIONS, WHERE THE FACTS OF THIS FELA CASE MADE CLEAR THAT THE PLAINTIFF HAD FAILED TO FILE SUIT WITHIN THREE YEARS OF THE DATE HE KNEW, OR SHOULD HAVE KNOWN, OF HIS INJURY AND ITS CAUSE.

Under FELA, a cause of action is time-barred "unless commenced within three years from the day the cause of action accrued." 45 U.S.C.A. § 56 (1981). The statute of limitations under FELA is not an affirmative defense; rather, compliance with the statute is a condition precedent to recovery. *Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983); *Frasure v. Union Pac. R.R. Co.*, 782 F. Supp. 477, 479 (C.D. Cal. 1991). "The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period." *Emmons*, 701 F.2d at 1118; *see Carpenter v. Erie R.R. Co.*, 132 F.2d 362, 363 (3d Cir. 1942), *cert. denied*, 318 U.S. 788 (1943). Contrary to Johnson's claims, the accrual of a cause of action under the precedent of this Court does not necessarily coincide with the date the plaintiff becomes "consciously aware of," or receives a medical diagnosis of, work-related injury. *United States v. Kubrick*, 444 U.S. 111, 123 (1979). Rather, it accrues when the claimant knows, *or in the exercise of reasonable diligence should know*, of his injury and its potential cause. *United States v. Kubrick*, 444 U.S. at 122-23; *Townley v. Norfolk and Western Ry. Co.*, 887 F.2d 498, 501 (4th Cir. 1989).

The courts below properly granted NW's Motion for Summary Judgment in this case because, on the record, Johnson produced no evidence to support his claim that he filed his suit within three years of the date he knew, or should have known, of his injury. In fact, the evidence clearly revealed that Johnson was aware of his hearing problems (and their relation to noise exposure at work) at least four years before he filed suit. (JA 65, 35.) Moreover, the evidence revealed that Johnson could not rule out that he was aware of his hearing problems as early as 1979, nine years before he filed his claim. (JA 32-33.) Under these facts, and where plaintiff bore the burden of proof on this point at trial (App. 4a), summary judgment was properly granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986).

A. There is No Conflict Among the Lower Courts with Respect to Application of the Discovery Rule; the Decisions turn on the Facts Peculiar to Each Case.

Plaintiff's effort to cultivate a "conflict" in the lower courts' application of the discovery rule in FELA cases is without merit. The cases presented by plaintiff as illustrating this "conflict" simply reflect the spectrum of outcomes that can occur under the discovery rule, depending on the particular facts of a given case.

As plaintiff observes, courts routinely have found FELA claims to accrue when the plaintiff knew or *should have known* that his hearing loss was work-related. *E.g., Bealor v. Missouri Pac. R.R. Co.*, 951 F.2d 38, 40 (5th Cir.

1991) (temporary hearing loss and ringing in ears following noise exposure); *Fries v. Chicago and Northwestern Transp. Co.*, 909 F.2d 1092, 1094-95 (7th Cir. 1990) (ringing in the ears; hearing getting progressively worse after noise exposure); *Albert v. Maine Cent. R. Co.*, 905 F.2d 541, 543-44 (1st Cir. 1990); *Billman v. Missouri Pac. R.R.*, 825 S.W.2d 525 (Tex. Ct. App. 1992); *Robb v. CSX Transp., Inc.*, 204 Ga. App. 690, 420 S.E.2d 370 (1992).[5]

Plaintiff cites three FELA hearing loss cases in which summary judgment was denied, and argues, based on these cases, that there exists a conflict of authority requiring this Court to grant a writ of certiorari. To the contrary, in each of the three cases cited by plaintiff, *Bechtholdt v. Union Pac. R.R. Co.*, 722 F. Supp. 704 (D. Wyo. 1989); *Smith v. States Marine Intern., Inc.*, 864 F.2d 410 (5th Cir. 1989); and *Monagahan v. Union Pac. R.R. Co.*, 242 Nob. 720, 496 N.W.2d 895 (1993), the particular facts of the case merited denial of the defendant's summary judgment motion.

The circumstances of those cases, however, are easily distinguishable from the facts of the instant case. In both *Bechtholdt* and *Smith*, for example, the plaintiffs provided clear evidence of an alternative cause (other than work-related noise) which they reasonably believed might have

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[5] Johnson mischaracterizes the holding of *Robb* at pages 4-5 of his Petition. *Robb* does not stand for the proposition that "a cause of action accrues whenever the plaintiff's ears first manifest any abnormality" as plaintiff asserts. The case held, properly, that the cause of action accrued when the plaintiff knew, or should have known, of "his condition and its cause."

caused their hearing loss. Thus, the claims were not barred because the plaintiffs did not know more than three years before filing their actions (1) that they had experienced hearing loss *and* (2) that the loss was work-related. 722 F. Supp. at 705; 864 F.2d at 412.[6] Here, however, Johnson conceded the *only* possible source of his hearing loss was workplace noise exposure. (JA 35.) In *Monagahan* the plaintiff produced evidence that, despite prior tinnitus, he did not experience an actual loss of hearing until 1987, only a year before he filed suit. *Monagahan*, 496 N.W.2d at 902. By contrast, here, Johnson could not remember when he experienced hearing loss, he admitted that it might have been more than three years before he filed suit, and medical evidence placed this loss well outside the statute of limitations. (JA 32-33, 65.)

B. The Courts Below did not Depart From the Prior Precedent of this Court; Rather the Courts Properly Rejected Johnson's Effort to Rewrite the Discovery Rule and Rejected Johnson's Improper Argument that the Statute of Limitations Should only be Triggered by the Plaintiff's Subjective Awareness That He Had Suffered "Permanant" Injury.

All of the cases discussed above faithfully cite the *Urie* discovery rule and place upon the plaintiff the duty

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[6] It is disingenuous for Johnson to assert, as he does at page 4 of his petition, that "the court below rejected the same arguments that persuaded the court in *Bechtholdt*." To the contrary, the Fourth Circuit clearly distinguished *Bechtholdt*, noting, "Unlike Johnson, the plaintiffs in *Bechtholdt* believed their hearing problems were caused either by aging or an automobile accident, not by work. *Id.* at 715." (App. 6a, n.3.)

to act within three years of the date he knew *or should have known* of his injury. It is Johnson who seeks to depart from the traditional discovery rule by arguing that the limitations period should be held in abeyance until he subjectively became aware that his hearing loss was "permanent." The Fourth Circuit rejected this contention persuasively below:

> Johnson [argues] that, although he may have experienced *temporary* hearing problems, or temporary threshold shift [TTS], in 1984 or before, he first realized that he might have *permanent* hearing loss during a conversation with co-workers that occurred sometime between May 16 and December 12, 1986. Since only permanent hearing loss is actionable under FELA, he reasons that he filed suit within three years of the time his action actually accrued. *See* Appellant's Br. at 11-17. We reject this *post hoc* effort to distinguish between temporary and permanent hearing loss for purposes of tolling the FELA statute of limitations. In many if not most cases, the dichotomy is false, since recurrent temporary (i.e., lasting for a day or two) hearing loss is a recognized symptom of permanent injury. Johnson's own expert Dr. Schumaier noted in his affidavit that "repeated episodes of TTS" are a sign that "permanent injury is occurring." J.A. at 74 par. 6.

(App. 5a, emphasis in original.)[7]

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[7] Moreover, this petition does not cleanly present the "permanent/temporary" distinction emphasized by Johnson. The only evidence dealing with Johnson's subjective belief of the "permanency" of his hearing loss is contained in his affidavit which flatly contradicts his prior deposition statements and

The Fourth Circuit went on to uphold the district court's finding that Johnson, based upon the extensive hearing difficulties he had experienced, should have known of his work-related injury long before the date he claims to have recognized his hearing loss was "permanent:"

> As the district court held, when Johnson began experiencing a ringing sensation in his ears and began noticing that his hearing was worse at the end of the work day than at the beginning, that he was forced to turn up his radio very loud in order to hear it when returning home from work, and that he was having trouble hearing conversations, he should have known of his work-related injury for purposes of the FELA statute of limitations. *See Bealer v. Missouri Pac. R.R.*, 951 F.2d 38, 40 (5th Cir. 1991) (temporary hearing loss and ringing in ears provided constructive notice of work-related injury to FELA claimant); *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1097 (7th Cir. 1990) (temporary work-related ringing in the ears put plaintiff on constructive notice of injury for FELA purposes) . . .

(App. 5a.)

Despite Johnson's efforts to champion a new requirement of "subjective knowledge of permanent injury" before the statute of limitations is triggered, the standard under FELA is an *objective* one. Johnson fails to present even a single case which states otherwise. Simply put, if a

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which, therefore, ought not be considered. *Barwick v. Celotex*, 736 F.2d 946 (4th Cir. 1984).

plaintiff experiences symptoms of injury only in relation to workplace exposure, and he cannot point to any other cause for the injury, then the plaintiff is held to be on notice that he has suffered a work-related injury and the statute of limitations begins to run. *Crisman v. Odeco, Inc.*, 932 F.2d 413, 416 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 337 (1991); *see also Fries*, 909 F.2d at 1095 (discovery rule does not allow plaintiff to "unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact of and cause of his injury"); *Townley v. Norfolk and Western Ry. Co.*, 887 F.2d at 501.

Johnson's symptoms, which he has admitted experiencing as early as December 1984, and perhaps even earlier, were sufficient to begin the running of the statute of limitations. (JA 65, 32-33.) Coupled with his actual and constructive knowledge of the work-related cause of his injury (JA 35), it is clear that Johnson possessed the critical facts regarding his cause of action more than three years before he filed his suit.

* * *

Thus, Johnson's petition presents none of the requisite elements for the granting of a writ of certiorari. He has failed to illustrate that there is a split of authority in application of the discovery rule or that the decision below constituted a departure in any respect from the precedent of this Court. In reality, the Fourth Circuit and the district court below applied well-settled law to the facts of this case and reached the only result possible – that Johnson's claim was time-barred. That decision was correct and warrants no further review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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